FILE COPY

Supreme Court, U. S.
FILED
DEC 6 1972
JOHN F. DAVIS, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE T. ALTMAN,
424 South Beverly Drive,
Beverly Hills, Calif. 90212,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Statement	2
Reasons for Granting the Writ	4
1. In Failing to Hold That the Finding of the Military Court—That the Time of Petitioner's Alleged Desertion Was "Time of War"—on the Basis Solely and Completely of the Corresponding Finding in United States v. Anderson, 38 CMR 386 (1968), Was a Violation of Due Process, the Decision Below Was in Clear Conflict With the Uniform Decisions of the Highest State Courts of the United States	4
2. If the Decision in the Anderson Case Is Treated Instead as a Conclusion of Law, Because of the View of Only One of Its Judges That the Gulf of Tonkin Resolution Was in Fact a Declaration of War, 38 CMR at Page 388, and Therefore Itself Established a Status of War, the Decision Below Is in Clear Conflict With the Decision of the Virginia Supreme Court in Jackson v. North American Assurance, 212 Va. 177, 183 S.E. 2d 160 (1971)	5
3. In Holding That the Issue as to Whether the Date of Desertion Charged, October 1, 1964, Was or Was Not in Time of War, Was Not Jurisdictional, the Decision Below Was in Clear Conflict With Decisions of This Court	5
Conclusion	6
Appendix. Opinion of the United States Court of Appeals for the Ninth Circuit ....App. p.	1

TABLE OF AUTHORITIES CITED

Cases	Page
Curtis v. Maryland Baptist Union Assn., 5 A. 2d 836, 176 Md. 430	4
Davis v. 1st National Bank, 161 S.W. 2d 467, 139 Tex. 36	4
Jackson v. North American Assurance, 212 Va. 177, 183 S.E. 2d 160 (1971)	5
Juhl v. United States, (C. Cl.) 383 F. 2d 1009	6
O'Callahan v. Parker, 395 U.S. 258 (1969)	5
Rose v. Jacobs, 329 S.W. 2d 170, 231 Ark. 286	4
Schwegman v. Neff, 29 N.E. 2d 985, 218 Ind. 63	4
Service v. Dulles, 354 U.S. 363	6
Toth v. Quarles, 350 U.S. 11 (1955)	5
United States v. Anderson, 38 CMR 386 (1968)	3, 4, 5
United States v. Broussard, 41 CMR 1004 (1970)	3
Regulation	
Air Force Regulations 35-73, No. 21	6
Statutes	
Uniform Code of Military Justice, Art. 43	2
Uniform Code of Military Justice, Art. 85	2
United States Code, Title 10, Sec. 843	2
United States Code, Title 10, Sec. 885	2
Textbooks	
50 Corpus Juris Secundum, Sec. 763	4
Manual for Courts-Martial (1969)	5, 6

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Ignatius J. Broussard, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 21, 1972.

Opinions Below.

The opinion of the court below is officially reported at 466 F. 2d 816. It is given in full in the Appendix, *infra*, beginning at page 1 thereof. The notation "App." below refers to the said Appendix.

Statement.

Petitioner was an airman first class in the United States Air Force, stationed at Kadena Air Base, Okinawa. He was arrested on March 18, 1969, and charged with violation of Article 85, Uniform Code of Military Justice, 10 U.S.C. §885 (desertion). [App. 1.]

The desertion date specified was October 1, 1964. [App. 1.] On December 6, 1967, the Assistant Chief, Airmen Branch, Directorate of Personnel Data and Records, had written to petitioner's parents:

> "This is to advise that the Department of the Air Force is making no further effort to apprehend AIC Broussard since he is a peacetime deserter and, as such, the Statute of Limitations has expired."

The FBI was also notified that petitioner was no longer being sought. Nevertheless, as above noted, on March 18, 1969, he was arrested and charged with desertion. A general court-martial convicted him and sentenced him to confinement at hard labor for four months, reduction in grade to E-1, forfeiture of pay and allowances, and a bad conduct discharge. [App. 1-2.]

The statute of limitations, Article 43 of the UCMJ, 10 U.S.C. §843, provides that desertion "in time of war" may be tried and punished at any time without limitation. Peacetime desertion is subject to a three year limitation. There is no claim by the government that petitioner's being a fugitive tolled the statute of limitations. [App. 6, fn.] As stated by the court below, the prosecution of petitioner was therefore barred if he deserted in peacetime, but not if he deserted in time of war. [App. 2.]

Before completion of his confinement, petitioner sought habeas corpus in the Central District of Cali-

fornia to void the sentence imposed upon him. Pursuant to motion relief was denied and petitioner appealed to the court herein below. It remanded to the District Court with instructions that the proceedings be held in abeyance until petitioner exhausted his administrative remedies, after which he could seek a determination on the merits in the District Court. [App. 2.]

Petitioner exhausted his administrative remedies and again resorted to the District Court. It considered the merits of his claim and denied relief on the ground that the military determination was correct. The district judge cited and adopted the decision of the Air Force Court of Military Review in *United States v. Broussard,* 41 CMR 1004 (1970). [App. 2.] Petitioner had presented to that court a claim that October 1, 1964, the date of his alleged desertion, was not "in time of war". That court rejected his claim, "following", as the court below put it, *United States v. Anderson,* 38 CMR 386 (1968). [App. 4.]

Apparently what the court below meant by the term "following" is the fact shown by the record that in the court-martial here no evidence of any kind was offered by the prosecution, or allowed to be offered by the defense, on the question whether the date, October 1, 1964, was, in fact, in time of war, and that on that question the Law Officer in the trial had ruled that the court-martial was bound, as a matter of law, by the *Anderson* case. [R. 3.] The court below then stepped aside from the question by holding that civil courts could only review the determination of a court-martial on the question whether the court-martial lacked jurisdiction, or due process amounting to lack of jurisdiction, and that the issues presented did not rise to that level. [App. 3.]

REASONS FOR GRANTING THE WRIT.

1. In Failing to Hold That the Finding of the Military Court—That the Time of Petitioner's Alleged Desertion Was "Time of War"—on the Basis Solely and Completely of the Corresponding Finding in United States v. Anderson, 38 CMR 386 (1968), Was a Violation of Due Process, the Decision Below Was in Clear Conflict With the Uniform Decisions of the Highest State Courts of the United States.

The majority of the court in the *Anderson* case treated its finding of time of war as only a finding of fact, which clearly it was, 38 CMR at pp. 391-392. Indeed, the court below herein itself held that the term "time of war" for the purpose here referred to "*de facto* war". [App. 4.] But the treatment here as *res adjudicata,* of that finding of fact in a case involving another party, is a violation of due process. The rule is that for *res adjudicata* there must be a substantial identity of parties as well as of subject matter. This is a fundamental principle of due process. 50 C.J.S. Judgments, §763, at fn. 22; *Curtis v. Maryland Baptist Union Assn.,* 5 A. 2d 836, 839, 176 Md. 430, 437; *Schwegman v. Neff,* 29 N.E. 2d 985, 986, 218 Ind. 63; *Rose v. Jacobs,* 329 S.W. 2d 170, 172, 231 Ark. 286; *Davis v. 1st National Bank,* 161 S.W. 2d 467, 473, 139 Tex. 36.

2. If the Decision in the Anderson Case Is Treated Instead as a Conclusion of Law, Because of the View of Only One of Its Judges That the Gulf of Tonkin Resolution Was in Fact a Declaration of War, 38 CMR at Page 388, and Therefore Itself Established a Status of War, the Decision Below Is in Clear Conflict With the Decision of the Virginia Supreme Court in Jackson v. North American Assurance, 212 Va. 177, 183 S.E. 2d 160 (1971).

In the *Jackson* case it was held that the Gulf of Tonkin Resolution was not in itself a declaration of war and therefore did not, of itself, establish a status of war. It follows that if in the *Anderson* case the Gulf of Tonkin Resolution was treated as a declaration of war, that case, and therefore the decision of the court herein below, is in clear conflict with the decision of the Virginia Supreme Court in the *Jackson* case.

3. In Holding That the Issue as to Whether the Date of Desertion Charged, October 1, 1964, Was or Was Not in Time of War, Was Not Jurisdictional, the Decision Below Was in Clear Conflict With Decisions of This Court.

According to the Manual for Courts-Martial, 1969, prescribed by the President of the United States, effective January 1, 1969, court-martial jurisdiction "ceases on discharge from the service *or other termination of that status.*" (Italics supplied.) Moreover, it has been directly held by this court that the jurisdiction of a court-martial depends upon the military status of the accused at the time of trial. *O'Callahan v. Parker,* 395 U.S. 258 (1969); *Toth v. Quarles,* 350 U.S. 11 (1955).

Now, under the regulations issued by the Secretary of the Air Force, AFR 35-73, #21, a "peacetime deserter whose trial for desertion is barred by the statute of limitations" is in the class of deserters who "must NOT [capitals in the original] be apprehended or returned to military control." Those regulations have the force and effect of law. *Juhl v. United States*, (C. Cl.) 383 F. 2d 1009, 1020. They are binding on the government as well as the serviceman. *Service v. Dulles*, 354 U.S. 363, 372.

Clearly then the letter of December 6, 1967, being in compliance with those regulations, was, under the provision above quoted from the Manual for Courts-Martial, an official declaration of "other termination" of petitioner's military status, and therefore of court-martial jurisdiction in respect to him. Clearly therefore also the issue as to whether the date of desertion charged to petitioner was peacetime or wartime was jurisdictional.

Conclusion.

Because of the conflicts cited above, we urge that this proceeding be accepted for review.

GEORGE T. ALTMAN,
Attorney for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Ignatius J. Broussard, Jr., Petitioner-Appellant, vs. Roderick R. Patton, Col., United States Air Force, Base Comm., MAFB, Jack J. Catton, Lt. Gen., United States Air Force, Comm. 15th AF, MAFB, Robert C. Seamans, Jr., Secretary of the Air Force, Respondents-Appellees. No. 72-1064.

[September 21, 1972].

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, CARTER, and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order denying and dismissing Broussard's petition for a writ of habeas corpus. We affirm.

Broussard was an airman first class in the United States Air Force, stationed at Kadena Air Base, Okinawa. On October 1, 1964, he deserted.

He was arrested on March 18, 1969, and charged with violation of Article 85, Uniform Code of Military Justice, 10 U.S.C. §885 (desertion). A general court-martial convicted him and sentenced him to confinement at hard labor for four months, reduction in

grade to E-1, forfeiture of pay and allowances, and a bad conduct discharge.

Before completion of his confinement, Broussard sought habeas corpus in the Central District of California to void the sentence imposed upon him. Relief was denied and Broussard appealed to this court. We remanded to the district court with instructions that the proceedings be held in abeyance until Broussard exhausted his administrative remedies, after which he could seek a determination on the merits in the district court.

Broussard exhausted his administrative remedies and again resorted to the district court. It considered the merits of his claim and denied relief on the ground that the military determination was correct. The district judge cited and adopted the decision of the Air Force Court of Military Review in *United States v. Broussard*, 41 CMR 1004 (1970).

I

The only significant issue is the application of the statute of limitations to Broussard's desertion. Article 43 of the UCMJ, 10 U.S.C. §843, provides that desertion "in time of war" may be tried and punished at any time without limitation. Peacetime desertion is subject to a three year limitation. The prosecution of Broussard was barred if he deserted in peacetime, but not if he deserted in time of war.

At the outset we must consider the scope of judicial review. We do not sit to supervise the military courts; rather our review is limited. Habeas corpus is available only to guard against the military courts exceeding their jurisdiction, *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v.*

Quarles, 350 U.S. 11 (1955), and to vindicate constitutional rights. *Burns v. Wilson*, 346 U.S. 137 (1953).

The relevant standard was stated, quite restrictively in *Fischer v. Ruffner*, 277 F.2d 756, 758 (5th Cir. 1960):

> "[E]ither lack of jurisdiction in the technical sense or a want of essential due process amounting to lack of jurisdiction [is] necessary to give the civil courts the power to review judgments of courts martial by habeas corpus."

Following *Burns v. Wilson, supra*, we have ruled that habeas corpus proceedings involving military convictions are limited to determining whether the court-martial had jurisdiction of the person accused and the offense charged and whether it acted within its lawful powers. *Sunday v. Madigan*, 301 F.2d 871 (9th Cir. 1962). We stated:

> "This may include an inquiry as to whether the military have given fair consideration to each of the petitioner's claims. But once it has been concluded by the civil courts that the military had jurisdiction and dealt fully and fairly with all such claims, it is not open to such courts to grant the writ simply to re-evaluate the evidence." *Sunday* at p. 873.

On the issue of our jurisdiction to review Broussard's claim, *Fischer v. Ruffner, supra*, holds, precisely on point, that the civil courts have no jurisdiction to entertain a habeas corpus petition which asserts as the sole ground for release of a convicted military prisoner that he was charged and tried after such action had been barred by the statute of limitations. However it is unnecessary for us to adopt the holding in *Fischer*,

because it is clear that in the case before us the military courts gave "full and fair consideration" to Broussard's claim. *Burns v. Wilson, supra; Sunday v. Madigan, supra.* Hence Broussard is not entitled to the writ. Cf. *Kasey v. Goodwyn,* 291 F.2d 174, 178 (4th Cir. 1961, *cert. denied* 368 U.S. 959 (1962).

Broussard's desertion occurred on October 1, 1964, after the Gulf of Tonkin Resolution (P. L. 88-408, August 10, 1964) but before the attack on American forces at Plieku (February 7, 1965) which initiated general ground fighting in Viet Nam.

Broussard presented the claim that his desertion was not "in time of war" to the Air Force Court of Military Review. *United States v. Broussard, supra.* That court rejected his claim, following *United States v. Anderson,* 38 CMR 386 (1968). The Court of Military Appeals denied review, 41 CMR 402 (1970).

It is an established rule of military law that, for purposes of Article 43, "time of war" refers to *de facto* war and does not require a formal Congressional declaration. *United States v. Bancroft,* 11 CMR 3 (1953); *United States v. Ayers,* 15 CMR 220 (1954); *United States v. Anderson, supra; cf. United States v. Shell,* 23 CMR 110 (1957).

In *Bancroft* the Court of military Appeals considered the extent of hostilities, together with the public posture of the Congress and the Executive, and ruled that the conflict in Korea precipitated a "time of war" for purposes of Article 43, despite the absence of a

formal Congressional declaration of war. *Anderson* made the same determination with regard to the present conflict in Viet Nam.

We do not understand Broussard to question this established case law, except to argue that the "time of war" attributable to the Viet Nam conflict for purposes of Article 43 began on February 7, 1965. Broussard stresses in his brief that, following the reported attack on the destroyers MADDOX and C. TURNER JOY, which led to the Gulf of Tonkin Resolution, there were no incidents of fighting until the attack on Plieku on February 7, 1965.

This claim was given full and fair consideration in *United States v. Anderson, supra.* The Court of Military Appeals thoroughly considered the relevant law and facts and determined that by the date of passage of the Gulf of Tonkin Resolution the Armed Foces were in a "time of war" for purposes of Article 43.

In light of the fact that the Court of Military Appeals gave this issue "full and fair consideration," in light of the fact that this is a uniquely military matter, and in light of the fact that the distinction between the date of passage of the Gulf of Tonkin Resolution and the date of the attack on Plieku is quite narrow, we defer to the judgment of the military court.*

---

*We do not find helpful the case of *Jackson v. North American Assurance,* 212 Va. 177, 183 S.E. 2d 160 (1971). That case construes the intent of parties to an insurance contract in using the word "war." The opinion recognizes that the word may have different meanings in different contexts. It turns largely on the doctrine that insurance policies are to be construed against the insurer.

II

Although not treated as a separate issue in his brief, Broussard has brought to our attention a letter from the Air Force to his parents. On December 6, 1967, the Assistant Chief, Airmen Branch, Directorate of Personnel Data and Records, wrote to Broussard's parents:

> "This is to advise that the Department of the Air Force is making no further effort to apprehend A1C Broussard since he is a peacetime deserter and, as such, the Statute of Limitations has expired."

The FBI was also notified that Broussard was no longer being sought.**

We take judicial notice of the fact related in the opinion in *United States v. Broussard, supra,* that on February 7, 1969, the Air Force notified Broussard's parents that the decision in *United States v. Anderson* had held the statute of limitations inapplicable to persons in Broussard's position and that the apprehension notices were being reactivated.

Broussard was not arrested until more than five weeks later.

Broussard has cited no case, nor have we found any, which holds that the giving of information to a potential defendant that the statute of limitations on his alleged offense has run, when the authority conveying the information is honestly mistaken, creates an estoppel against that authority barring future prosecution.

Affirmed.

**There is no claim that Broussard's being a fugitive tolled the statute of limitations.

KOELSCH, Circuit Judge, Concurring Specially:

The majority, as I understand its opinion, puts the judicial seal of approval upon the Court of Military Appeals' determination, on the merits, that Broussard's alleged desertion occurred in "time of war" within the meaning of Article 43, as construed by military courts. Considerable reliance is placed upon *United States v. Anderson*, 38 C.M.R. 386 (1968).

However, in my view, we should declare only that this court lacks jurisdiction to review the military court's determination. As well said by Judge Tuttle, writing for the Fifth Circuit in *Fischer v. Ruffner*, 277 F.2d 756, 759 (5th Cir. 1960):

> ". . . such plea [i.e., bar of limitations] if made and if decided erroneously presented only questions of law and fact not touching on due process or technical jurisdiction of the military courts. Any ruling or denial of relief based thereon is not reviewable by habeas corpus."

I concur in the result.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR., PETITIONER

v.

COLONEL RODERICK R. PATTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

After a trial by general court-martial in 1969, petitioner was convicted of having violated Article 85 of the Uniform Code of Military Justice, 10 U.S.C. 885, by deserting from Kadena Air Base, Okinawa, while in active service as an airman first class in the United States Air Force. He was sentenced to confinement at hard labor for four months, reduction in grade to E-1 (airman basic), forfeiture of pay and allowances, and a bad conduct discharge. The Air Force Court of Military Review affirmed, 41 C.M.R. 1004, and a petition for review was denied by the United States Court of Military Appeals, 41 C.M.R. 402. The United States District Court for the Central District of California

denied and dismissed a petition for a writ of habeas corpus and the court of appeals affirmed (Pet. App. 1[1]; 466 F. 2d 816). The question before this Court is whether the courts below properly concluded that habeas corpus was not available for review of the decision of the military courts that his desertion had taken place "in time of war" for purposes of the statute of limitations in the Uniform Code of Military Justice.

The pertinent facts are set forth in the opinion of the court of appeals. Briefly, on October 1, 1964, petitioner deserted from the Air Base at which he was stationed on Okinawa. He remained at large until March 18, 1969, when he was arrested by the Federal Bureau of Investigation. In a letter dated December 6, 1967, the Air Force had informed petitioner's parents that it was making no further effort to apprehend him since he was considered "a peacetime deserter" as to whom the three-year statute of limitations had expired. In a subsequent letter dated February 7, 1969, prior to petitioner's arrest, his parents were informed by the Air Force that it was reactivating its apprehension notices in light of the intervening decision by the United States Court of Military Appeals in *United States* v. *Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386,

[1] Earlier, before petitioner had exhausted his administrative remedies within the military justice system, the district court had denied the petition for a writ of habeas corpus. The court of appeals remanded with directions that the proceeding be held in abeyance until petitioner exhausted his administrative remedies. The denial of relief by the district court at issue here was entered after exhaustion of those remedies (Pet. App. 2).

which held that the statute of limitations did not apply to persons who had deserted after August 10, 1964, since such desertions were considered "in time of war" and the Uniform Code provides no period of limitations for such offenses.

Petitioner contends that the military courts erred in relying on *United States* v. *Anderson, supra,* in holding that because petitioner deserted "in time of war" his prosecution for desertion was not barred by Article 43 of the Uniform Code, 10 U.S.C. 843. But as the court of appeals pointed out, civilian courts have only limited jurisdiction to review the determinations of military courts. Civilian courts are not warranted in granting habeas corpus relief to a serviceman convicted of a military offense, if the military courts gave "full and fair consideration" to his claims of legal error. See generally *O'Callahan* v. *Parker,* 395 U.S. 258; *Toth* v. *Quarles,* 350 U.S. 11; *Burns* v. *Wilson,* 346 U.S. 137; *Hiatt* v. *Brown,* 339 U.S. 103; *Sunday* v. *Madigan,* 301 F.2d 871 (C.A. 9); *Fischer* v. *Ruffner,* 277 F.2d 756 (C.A. 5). Indeed, one of the cases on which petitioner relies, *Juhl* v. *United States,* 383 F. 2d 1009 (Ct. Cl.) (Pet. 6), was reversed by this Court *sub nom. United States* v. *Augenblick,* 393 U.S. 348, 356, on the ground that a court-martial judgment is collaterally reviewable by the civil courts only when the military

trial was "conducted in violation of express constitutional mandates" but not when the only issue is the interpretation or application of military law. Here the military courts have fully, fairly, and finally resolved the question of statutory construction against petitioner, and review of that question on habeas corpus was properly declined.

Petitioner's claim that the Air Force letter of December 6, 1967, acted as a termination of his military status is without merit. The letter was not and did not purport to be a discharge of petitioner from the military or a notice of termination of his military status. It merely served to notify petitioner's parents that the Air Force was ceasing efforts to apprehend petitioner; that notice was rescinded by the subsequent letter of February 7, 1969. Under these circumstances, the general court-martial had jurisdiction over petitioner. The court of appeals found that the military courts fully and fairly considered petitioner's claims on appeal (Pet. App. 3–4). Further review by this Court is thus not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973

TABLE OF AUTHORITIES CITED

Cases	Page
Boske v. Comingore, 177 U.S. 459	1
Bridges v. Wixon, 326 U.S. 135	1
Burns v. Wilson, 346 U.S. 137	2
Hiatt v. Brown, 339 U.S. 103	2
Juhl v. United States, (Ct. Cl.) 383 F. 2d 1009	1
O'Callahan v. Parker, 395 U.S. 258	2
Reed, Ex parte, 100 U.S. 13	1
Toth v. Quarles, 350 U.S. 11	2
United States v. Anderson, 38 C.M.R. 386	3
United States v. Augenblick, 393 U.S. 348	1, 2
United States v. Averette, 41 C.M.R. 363	3
United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260	1
United States ex rel. Bilokumsky v. Tod, 263 U.S. 149	1

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

COLONEL RODERICK R. PATTON, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioner to Brief of Respondents in Opposition.

We thank respondent for noting our error in citing *Juhl v. United States,* (Ct. Cl.) 383 F. 2d 1009, instead of the underlying decisions of this court on the point involved, that duly authorized regulations have the force and effect of law. Those decisions, repeating that point again and again, and spread over almost a century, have embedded it in the basic law of this nation. They include *Ex Parte Reed,* 100 U.S. 13, 22; *Boske v. Comingore,* 177 U.S. 459; *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 155; *Bridges v. Wixon,* 326 U.S. 135, 150-156, and *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 265. And the point on which the *Juhl* case was reversed in *United States v. Augenblick,* 393 U.S. 348, 356, has nothing

to do with any of the points on which this petition for certiorari is based.

Nor does *Augenblick*, nor any of the other cases cited by respondents, say that a violation of due process, or a lack of jurisdiction, is any the less such because it occurs in a court-martial case. *Augenblick* merely excluded from civil review "any error that may be committed in evaluating the evidence" (p. 352). Any error in that case, this court also found, did not present a " 'constitutional' defect" (p. 352). There was the same situation in *Burns v. Wilson*, 346 U.S. 137. This court held there that a civil court could not grant the writ of habeas corpus "simply to re-evaluate the evidence" (p. 142), "to re-examine and reweigh each item of evidence" (p. 144). And in *Hiatt v. Brown*, 339 U.S. 103, this court held that the civil courts had no power to review a court-martial in respect to "the sufficiency of the evidence", or "the adequacy of the pretrial investigation" (p. 110). The decision of the court-martial was final, this court there indicated, if "the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers" (p. 111). And in *O'Callahan v. Parker*, 395 U.S. 258, 267, and *Toth v. Quarles*, 350 U.S. 11, 14-15, it was held, as we pointed out in our petition, at page 5, that jurisdiction of a court-martial depends upon the military status of the accused, not only at the time of the offense, but also at the time of trial.

Respondent, however, would contend that petitioner was still in the armed services, that there was no "termination of his military status," even though he had been notified that the statute of limitations had expired so that, under regulations having the force and effect of

law, he could not be "returned to military control". Respondent's assumption, at page 4, that such a termination could be "rescinded" necessarily contradicts itself, for it would mean that after petitioner had become a civilian by virtue of such termination, and free of military control, he was still in the armed services and subject to its control.

This point is of the greatest importance because of the higher level in which the constitutional rights of the civilian are held as compared to those of a member of the armed forces. The very court which decided the case of *United States v. Anderson*, 38 C.M.R. 386, referred to in the petition, page 3, involving a member of the armed forces, defined the term involved there, "time of war", in the case instead of a civilian accompanying the armed forces, as meaning only war established by a declaration of war by Congress in accordance with the Constitution. *United States v. Averette*, 41 C.M.R. 363.

Moreover, and this is still more basic, to leave, as respondents would, to the *final* judgment of a court-martial, any question of fact or law determinative of status as between military and civilian at the time of trial, would leave to the court-martial the final determination of its own jurisdiction, which is clearly contrary to the decisions of this court above cited, including the very decisions relied on by respondent.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

FILE COPY

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
MAR 13 1973
MICHAEL RODAK, JR., CLERK

October Term, 1972
No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

GEORGE T. ALTMAN,
424 South Beverly Drive,
Beverly Hills, Calif. 90212,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Grounds for Rehearing	1
Conclusion	3

TABLE OF AUTHORITIES CITED

Cases

Robb v. United States (Ct. Cl., 1972) 456 F. 2d 768	1, 2, 3
United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968)	2
United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970)	2

Statutes

Uniform Code of Military Justice, Art. 2(10)	2
United States Constitution, Art. I, Sec. 8, Cl. 11	2

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

We now petition the Court for rehearing of our petition for a writ of certiorari.

Grounds for Rehearing.

Our principal ground is to bring to the Court's attention a conflict of the decision below with *Robb v. United States* (Ct. Cl., 1972) 456 F. 2d 768, which did not come to our attention until after we had filed reply to the brief in opposition.

That case involved a civilian employee of the Navy on duty in Vietnam during 1967 and 1968. He was

court-martialed under Article 2(10) of the U.C.M.J., which authorized court-martial in "time of war" of "persons serving with or accompanying an armed force in the field." He was convicted. A fine was imposed upon him and suit was filed for its refund contending that "time of war" in the case of a civilian could only mean a war declared by Congress, citing *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970), referred to in our reply brief.

The Court of Claims, conceding that, the parties not being the same, it was not "bound" by *Averette* (p. 772), decided nevertheless to "adopt" *Averette* (p. 771), without defending it, indeed, even admitting, through the voice of a concurring member of the Court, that it could not find "a basis in reason" for *Averette* (p. 772).

If *Averette*, however, was right, was *Anderson* (*United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968)) still right? In other words, if Vietnam was not a "time of war" for a civilian serving with an armed force in the field, was it nevertheless a "time of war" for the very armed force with which he was serving? And why would this difference be erased by a declaration of war? In substance, is there anything in Article I, Section 8, Clause 11 of the Constitution to say that it applies only to civilians, that the Constitution, or the power of Congress under it, has no application to a member of the armed forces?

No wonder the Court of Claims in *Robb* "adopted" *Averette* without attempting to find "a basis in reason" for it. It even went so far as to say that a recognition of the actual war character of the Vietnamese armed conflict "should not serve as a shortcut for a

formal declaration of war", that is, "at least" not as far as civilians are concerned (p. 771). But, under the decision herein below, as far as members of the armed forces are concerned, there is no such recognition of the power of Congress under the Constitution.

We submit that the decision herein below cannot, on a basis of reason and substance, be reconciled with *Robb*. Consistently with reason and substance, the conflict between them cannot be erased or avoided.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Dated: March 13, 1973.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

Certificate of Counsel.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

GEORGE T. ALTMAN,
Counsel for Petitioner.

FILE COPY

APR 16 1973

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR., PETITIONER

v.

COLONEL RODERICK R. PATTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MEMBERS AND FORMER MEMBERS OF CONGRESS FOR LEAVE TO FILE BRIEF AMICI CURIAE ON MOTION FOR REHEARING OF DENIAL OF THE PETITION FOR CERTIORARI, AND BRIEF

AMICI CURIAE

HON. JAMES ABOUREZK	HON. JOHN MOAKLEY
HON. HERMAN BADILLO	HON. WAYNE MORSE
HON. GEORGE E. BROWN	HON. JOHN MOSS
HON. JOHN CONYERS	HON. WAYNE OWENS
HON. RONALD V. DELLUMS	HON. CHARLES RANGEL
HON. DON EDWARDS	HON. THOMAS REESE
HON. WILLIAM FULBRIGHT	HON. DONALD RIEGLE
HON. ERNEST GRUENING	HON. BENJAMIN ROSENTHAL
HON. MICHAEL HARRINGTON	HON. F. PETE STARK
HON. FLOYD K. HASKELL	HON. ANDREW YOUNG
HON. HENRY HELSTOSKI	HON. STEPHEN YOUNG
HON. ROBERT KASTENMEIER	

LAWRENCE SPEISER
1620 EYE STREET, N.W.
WASHINGTON, D.C. 20006
ATTORNEY FOR AMICI CURIAE

OF COUNSEL:

HERBERT SEMMEL
ERIC SEITZ

LEGAL ASSISTANTS:

SUSAN FOX
NORMAN J. JACQUES
STEPHEN SCHMIDT
JOAN STEMBER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR., PETITIONER

v.

COLONEL RODERICK R. PATTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF MEMBERS AND FORMER MEMBERS OF CONGRESS FOR LEAVE TO FILE BRIEF AMICI CURIAE ON MOTION FOR REHEARING OF DENIAL OF THE PETITION FOR CERTIORARI

Amici Curiae hereby respectfully move for leave to file the accompanying brief in support of the motion of petitioner for rehearing of the denial of the petition for certiorari herein and to support the granting of certiorari. George T. Altman, attorney for petitioner, has consented to the filing of this amici

curiae brief. The Solicitor General, attorney for respondent, has declined to grant consent because the brief amici curiae relates to a petition for rehearing but stated he will not oppose this motion.

INTEREST OF AMICI CURIAE

Amici Curiae are present and former members of the United States Senate and the House of Representatives, the sole bodies empowered by the Constitution to declare war, Article I, Section 8 (11). As such, they have a vital interest in obtaining a clarification of the respective powers of Congress and the President to commit the Armed Forces of the United States to extended hostilities.

ISSUES NOT PRESENTED BY THE PARTIES

The issue raised before this Court by petitioner failed to bring to the Court's attention the fundamental Constitutional issues implicit in this case. The courts below have interpreted an enactment of Congress tolling the statute of limitations for desertion from the Armed Forces "in time of war," 10 U.S.C. § 843(a), without giving any consideration to the significance of the Constitutional delegation to Congress alone of the power to declare war. When Congress passes a statute applicable only "in time of war,"

it must presumptively be read in light of the constitutional power of Congress to declare war. Otherwise, the case below would support an inference that Congress recognizes the power of the Executive alone to commit the nation to war. Such recognition was never intended by Congress. It therefore becomes vital to the national security for this Court to offer some guideline as to the power of the President to engage the Armed Forces in hostilities without a Congressional declaration of war. Mr. Justice Douglas has pointed out that the failure of the courts to clarify these constitutional issues has contributed to the unprecedented national disunity over the Vietnam conflict. Holmes v. United States, 391 U.S. 936 (1968) (dissenting opinion to denial of certiorari).

Respectfully submitted,

LAWRENCE SPEISER
1620 EYE STREET, N.W.
WASHINGTON, D.C. 20006
ATTORNEY FOR
AMICI CURIAE

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR., PETITIONER

v.

COLONEL RODERICK R. PATTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MEMBERS AND FORMER MEMBERS OF CONGRESS AS AMICI CURIAE ON MOTION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI

LAWRENCE SPEISER
1620 EYE STREET, N.W.
WASHINGTON, D.C. 20006
ATTORNEY FOR
AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici Curiae are present and former members of the United States Senate and the House of Representatives, the sole bodies empowered by the Constitution to declare war, Article I, Section 8 (11). As such they have a vital interest in obtaining a clarification of the respective powers of Congress and the President to commit the Armed Forces of the United States to extended hostilities.

ARGUMENT

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Never in the history of the Republic has this Court given definitive guidance on what may be the most significant constitutional issue of all: the power of the President, absent a Congressional declaration of war, to send the Armed Forces of the United States into battle in foreign countries, except on a temporary, emergency basis.[1] The events in

---

[1] Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1778 (1968).

Vietnam over the last ten years and the widespread national disagreement over the powers of the President in Vietnam demonstrate the necessity for constitutional guidance at this time. The considerations which persuaded this court to decline to review the "legality" of the Vietnam conflict while hostilities were still underway[2] have been diminished or eliminated by the termination of hostilities, the withdrawal of American forces and the release of American prisoners. In the face of a growing constitutional crisis of authority involving the legislative and executive branches of government, this Court should perform its historic role of constitutional arbiter.

The questions presented by this case are of "great magnitude," "large and deeply troubling" and, as Mr. Justice Stewart anticipated in his dissent to the denial of certiorari in Mora v. McNamara,[3] the issue will not go away

---

[2] U.S. v. Mitchell, 369 F.2d 323 (2d Cir.), cert. den., 386 U.S. 972 (1967); Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), cert. den., 389 U.S. 934 (1967); Holmes v. U.S., 387 F.2d 781 (7th Cir. 1967), cert. den., 391 U.S. 936 (1968); Massachusetts v. Laird, 400 U.S. 886 (1970). See Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).

[3] 389 U.S. 934 (1967).

simply by refusing to hear any particular case. Rather, the issue will continue to be presented to the lower courts. The case at bar demonstrates that the courts cannot avoid a determination of whether the nation was "at war" in Vietnam. Petitioner Broussard's prosecution for desertion was barred by the statute of limitations unless he had deserted "in time of war." The power of military courts to try civilians[4] and the applicability of the higher penalties for sabotage[5] also require a judicial finding that the nation is "at war." Thus the question is not whether this issue should be judicially decided, but rather whether an issue of such magnitude will be left to the conflicting decisions of the lower federal constitutional courts,[6]

---

[4] 10 U.S.C. § 802(10). Other sections of the Uniform Code of Military Justice which require a determination of whether the nation was at was are 10 U.S.C. §§ 843(a), (e) and (f), 885(c), 890, 901, and 906. See Note, 67 Mich. L. Rev. 841 (1969).

[5] 18 U.S.C. § 2153.

[6] Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), cert. den., 404 U.S. 869 (1971); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).

state courts,[7] military courts[8] and other con-constitutional federal courts (e.g., Court of Claims).[9]

I

CONGRESS AND THE PRESIDENT BOTH REQUIRE CONSTITUTIONAL GUIDANCE ON THEIR WAR-MAKING POWERS

Except for the two great World Wars, Vietnam has cost more American lives than any foreign conflict in our history. Yet the legal basis for the conflict remains questionable and obscure. Successive administrations have often relied on the 1964 Gulf of Tonkin resolution as the basis for Presidential authority in Vietnam, yet the conflict continued after that resolution was repealed by Congress.

---

[7] Jackson v. North Amer. Assurance Soc. of Virginia, 212 Va. 177, 183 S.E.2d 160 (1971); Freed v. Baldi, 166 Colo. 344, 443 P2d 716 (1968), app. dis. 393 U.S. 317 (1969).

[8] U.S. v. Averette, 41 C.M.R. 363 (1970); U.S. v. Anderson, 38 C.M.R. 386 (1968).

[9] Robb v. U.S., 456 F2d 768 (Ct. Cl. 1972).

Cambodia was invaded without any specified legal authority except for a general purpose to protect American troops in Vietnam, a "domino" theory which may be endless -- Thailand to protect Cambodia, Burma to protect Thailand and ultimately perhaps China to protect all the former.

In essence, some Presidents have asserted the right to commit the Armed Forces for extended combat anywhere in the world without Congressional approval. The most definitive statement of this position is the State Department Memorandum "The Legality of the United States Pacticipation in the Defense of Vietnam"[10] which asserted that the powers of the President under Article II to conduct foreign affairs and act as Commander-in Chief includes "the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States." In a shrinking world, the Memorandum asserted, "an attack on a country far from our shores can impinge directly on the nation's security." Finally, the Memorandum claimed that "the Constitution leaves to the President the judgement to determine" when national security is threatened so that our Armed Forces can be

---

[10] 54 Dep't State Bull. 474 (1966), reprinted 75 Yale L.J. 1085.

committed without consulting Congress.[11]

Such a claim of Presidential power is hardly in keeping with the separation of war-making powers as it was originally conceived. The Constitution wisely denied to the President the broad power asserted above by the Executive when it vested in Congress the power to declare war. Hamilton, in the Federalist papers, noted that the President would be Supreme Commander but would not have the powers of the British King to declare war and raise armies, "all which by the Constitution under consideration would appertain to the Legislature."[12]

The need to preserve to the democratically elected representatives of the people the power to declare war is greater that ever today when the subtleties and complexities of the President's power to conduct foreign affairs make possible a gradual, often imperceptible, change from aiding a foreign government to sending American armed forces into battle. As Mr. Justice Frankfurter warned, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disin-

---

[11] 75 Yale L.J. at 1100, 1101.

[12] The FEDERALIST, No. 69 at 465.

COPY BOUND TO

terested assertion of authority."[13] An agreement between governments to furnish economic assistance expands to include military assistance, followed by personnel to train the foreign troops, then advisors in the field of combat, troops to protect the advisors or give logistic support, and finally full-scale commitment of American forces to the conflict. Congress is then faced with a fait accompli and the issue before Congress is not the one given it by the Constitution, shall a war commence, but rather the support of a war already begun by the Executive.

The Vietnam conflict may very well have provided us with an example of a war in which the President could not have obtained a majority of Congress to declare war, but once having committed our forces and with the conflict raging, had little trouble mustering a Congressional majority to give material support to our men fighting in the field. Congressional appropriations for American troops fighting abroad do not necessarily involve approval of the decision to send troops nor do they authorize the waging of an expanded war. The more urgent the situation presented to Congress as a fait accompli, the less should an appropriation be regarded as consent to the action.

---

13 Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952)(concurring opinion).

D CLOSE IN CENTER

Senator Aiken (R.-Vt.) exemplified this Congressional dilemma in the debate of the 1965 Southeast Asian Emergency Appropriations Act, stating: "Mr. President, I wish to make it plain that my vote is not intended as an endorsement of the costly mistakes of the past, nor as authority to wage war in the future unless such war is declared by Congress."[14]

A procedure which places Congress in such a dilemma perverts the constitutional scheme so carefully detailed by the Framers and deprives Congress and the people of the most fundamental of Congress' constitutional powers -- the power to decide to go to war or not to go to war. "A strong case can be made for the proposition that compliance with the Constitution of the United States and its plain provision that the power to declare war lies, not in the President, but in the Congress, should be made to rest upon something better than the ambivalences of congressional inaction or mere defense legislation, appropriations and questionable resolutions..." Mottola v. Nixon, 318 F. Supp. 538, 553 (1970).

It is apparent that Congress and the President require from this Court guidance on the significance of appropriations as a sanction for already on-going

---

[14] 111 Cong. Rec. 9499 (1965).

military actions. Similarly, the power of the President to take military action under a Congressional Resolution short of a declaration of war is in need of clarification. The potential danger in the use of such resolutions is illustrated by the Gulf of Tonkin Resolution. Many members of Congress thought they were authorizing only a limited response to an attack on American naval vessels by a small North Vietnamese craft,[15] but successive Presidents have cited that Resolution as authority for a full scale war in Southeast Asia.[16]

Congress itself is considering legislation to reassert its constitutional authority to declare war. There are more than 20 bills pending in Congress concerning the war powers of Congress and the Executive. Those that were filed before the Vietnam cease-fire agreement[17]

---

15 Documents Relating to the War Power of Congress, the President's Authority as Commander-in-Chief and The War in Indochina, Committee on Foreign Relations, United States Senate, 91st Cong., 2nd Session, (1970) at 105.

16 Statement of Nicholas D. Katzenbach, Senate Committee on Foreign Relations, U.S. Committments to Foreign Powers, S. Rept. No. 797, 90th Cong., First Sess. 82(1967).

17 93rd Congress, First Sess. H.Con. Res. 44, H.R. Nos. 179,233,407; Senate Bills Nos. 2,8,48,212.

deal solely with that particular conflict. They prohibit the expenditure of funds for the deployment of troops in Vietnam, Cambodia and Laos and the bombardment of those countries and provide for the withdrawal of all American Forces. Safeguards providing for the direct defense of withdrawing troops are allocated to the President with the proviso that he report all such activities promptly in a written report to Congress. Other bills are more broadly concerned with the delegation of constitutional authority for deployment of United States Armed Forces in military hostilities.[18] These bills establish rules and guidelines governing the use of the Armed Forces in absence of a declaration of war by Congress. The effectiveness of such proposals, however, depends on Presidential acknowledgement of the authority of Congress and the limits of Presidential power. Neither acknowledgement appears to have been forthcoming.[19]

The case at bar presents an opportunity for this Court to play its historic role of delineating the powers of the respective branches of government. Although no precise definition of when the nation is "at war", applicable for all purposes, may be feasible, at least some guidance

---

18 93rd Congress, 1st Sess. H.J. Res. Nos. 2, 96; H.R. Nos. 317, 414, 454; S.440.

19 See Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970) at 545.

COPY PRINTED CLOSE TO EDGE

will be afforded the nation and its government. For example, this Court could reaffirm the basic principle of the Civil War Prize Cases[20] that the President may not initiate war but is empowered to resist foreign invasion or suppress domestic insurrection. This basic distinction between the use of armed force to protect the country at home on the one hand and engage in foreign military actions on the other is as vital today as it was in 1862, indeed more so because of the speed with which military forces can be sent into battle anywhere in the world. At this juncture, with no American force engaged in battle, the moment is ripe for judicial guidance on these important Constitutional issues.

II

THE CASE IS APPROPRIATE FOR REVIEW BY CIVILIAN COURTS

Habeas corpus is an appropriate vehicle for review herein because the determination of whether petitioner deserted "in time of war"[21] goes to the jurisdiction of the trial court. If the statute of limitations had run at the time of petitioner's trial, petitioner was at

---

20 67 U.S. 635 (1862).

21 10 U.S.C. § 843(a).

least de facto and arguably de jure a civilian no longer subject to military jurisdiction. Under Air Force Regulations, AFR 35-73 #21, "a peacetime deserter whose trial is barred by the statute of limitations" should not be returned to military control. Thus the issue of whether petitioner deserted in time of war or peace goes to the jurisdiction of the military courts to try petitioner and is reviewable by the civilian courts in an action for habeas corpus.

Respectfully submitted,

LAWRENCE SPEISER
1620 EYE STREET, N.W.
WASHINGTON, D.C. 20006
ATTORNEY FOR
AMICI CURIAE